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JAKARA SDN BHD v. HSBC BANK MALAYSIA BHD

HIGH COURT SABAH & SARAWAK, KUCHING
ALWI WAHAB JC
[SUIT NO. KCH-22-42-3-2012]
24 NOVEMBER 2015

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BANKING: *Banks and banking business – Time deposit – Placement of deposit into new time deposit – Withdrawal of sum – Whether events took place with plaintiff's knowledge and instruction – Whether unlawful for bank to uplift and replace time deposit unilaterally – Whether there was need to issue new time deposit – Whether explanations provided by bank acceptable – Whether original time deposit receipt in plaintiff's possession – Whether letter of indemnity executed by plaintiff – Whether plaintiff instructed bank to transfer proceeds of time deposit into plaintiff's current account – Whether plaintiff received statement of account – Doctrine of laches – Whether plaintiff's action maintainable*

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Pursuant to a time deposit of RM2 million pledged by the plaintiff with the defendant, a time deposit receipt No. 0964 dated 28 October 1988 under the plaintiff's account No. 322-062878-145 was issued by the defendant. After more than 20 years, the plaintiff found out that the said deposit had been withdrawn and this, as submitted, was done without the plaintiff's knowledge. However, the defendant alleged that the plaintiff had already uplifted the time deposit in 1989 and the account had been closed. Upon inquiry, the defendant explained that the time deposit receipt No. 0964 was uplifted on 28 February 1989 and the proceeds of RM2,015,000 was placed under a new time deposit receipt No. 0972 for three months which matured on 28 April 1989. After a couple of renewals, the time deposit receipt No. 0972 was uplifted on 3 October 1989 but placed back under time deposit receipt No. 0980 on 4 October 1989. Finally, it was alleged that the time deposit receipt No. 0980 for the sum of RM2,047,875.98 was uplifted on 20 October 1989. Dissatisfied with the defendant's reasoning, the plaintiff filed this claim to account for the time deposit of RM2 million placed with the defendant. It was argued, *inter alia*, that (i) there was no instruction from the plaintiff to the defendant to place the proceeds of the time deposit receipt No. 0964 under the new time deposit receipt No. 0972; (ii) the time deposit receipt No. 0964 could by itself be extended for another three months without the need to issue a new time deposit; (iii) the plaintiff was not informed about the placement of the proceeds into the new time deposit receipt No. 0972; (iv) there was no instruction from the plaintiff for the uplifting of the time deposit receipt No. 0972 and to place the proceeds back into the new time deposit receipt No. 0980; (v) the plaintiff did not execute the letter of indemnity dated 3 October 1989 and it was illogical for the defendant to accept the plaintiff's letter of indemnity due to the alleged excuse that the original time deposit receipt No. 0964 was mislaid, lost or

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destroyed; (vi) the statement of account was not served on the plaintiff; (vii) the defendant failed to produce and show that the plaintiff had duly signed at the back of the said original time deposit receipts for each time the deposits were uplifted; and (viii) the plaintiff did not give any instruction *vide* the letter of indemnity to transfer the proceeds of the time deposit into its current account. However, the defendant contended that the plaintiff's action was not maintainable based on the doctrine of laches since there was a delay of more than 20 years for the plaintiff to initiate this action.

Held (allowing plaintiff's claim with costs):

(1) No evidence was adduced to show that the plaintiff had, either verbally or in writing, instructed the defendant to place the proceeds of the time deposit receipt No. 0964 into a new time deposit receipt No. 0972. The defendant bore the burden to prove that there was such a new time deposit receipt No. 0972 issued by the defendant on the instruction of the plaintiff. Since the defendant was not able to prove this, the defendant's allegation that there was such a new time deposit receipt No. 0972 failed. Further, the defendant did not give any explanation as to why the original time deposit receipt No. 0964 had to be uplifted and replaced with a new time deposit receipt No. 0972 when the original time deposit receipt No. 0964 could automatically be extended. It was unlawful for the defendant to uplift and replace the time deposit unilaterally without the plaintiff's instruction. (paras 27 - 29 & 55)

(2) There was no evidence to support the allegation that the plaintiff had complained to the defendant that they had mislaid, lost or destroyed the original time deposit receipt No. 0964. The said time deposit receipt was at all times with the plaintiff and it was never surrendered to the defendant for withdrawal. The defendant also failed to prove that the plaintiff's director had signed the letter of indemnity. Further, it was also not proved as to who wrote the notation at the bottom left hand corner of the letter of indemnity with the instruction that the deposits were to be transferred to the plaintiff's current account (*Chiew Lip Seng v. Perwira Habib Bank (M) Bhd*; refd). (paras 31, 32, 35 & 36)

(3) The record of transaction in the plaintiff's current account was not consistent with the evidence adduced as it was only in relation to the deposit of RM2 million pledged with the defendant under the plaintiff's time deposit account No. 322-062878-145. The defendant did not adduce any evidence that the said sum deposited under the time deposit receipt No. 0964 and uplifted on 28 February 1989 were the transactions made under the plaintiff's current account No. 322-062878-001. Further, there was no explanation as to why the sum of RM2 million could appear at the bottom of the plaintiff's current account No. 322-062878-001 when it was deposited in the plaintiff's time deposit account No. 322-062878-145. The defendant could not adduce

A the plaintiff's statement of account and have it marked as exhibit without explaining its contents relevant to the case through the evidence of the witness. The defendant also could not prove that such alleged statement of account of the plaintiff's current account No. 322-062878-001 was sent and received by the plaintiff. (paras 42, 43 & 45)

B **(4)** The details in relation to the plaintiff's statement of account were not clearly explained and not supported with source document. The defendant was required to prove and explain the contents of these documents since they were only copies of the original documents which were already destroyed but alleged to be kept in the micro fiche C negatives. The defendant did not produce any evidence that the plaintiff instructed the defendant to transfer the deposit of RM2,047,875.98 into the plaintiff's current account when the time deposit receipt No. 0972 was uplifted on 3 October 1989. Both time deposit receipts No. 0972 and 0980 were not produced at all. (paras 46 & 47)

D **(5)** No explanation was given as to why the time deposit No. 0972 was uplifted on 3 October 1989 when the maturity date was given until 28 October 1989. Thus, the letter of indemnity allegedly signed by the plaintiff could not be true in light of the inconsistent facts from the defendant's alleged sequence of events. Further, no statement of account E on the time deposits' history record was given to the plaintiff due to confidentiality. However, the defendant should have furnished the details in relation to the manner the deposits were uplifted, who withdrew it and the person from the defendant's bank who attended to the withdrawal. (paras 50 & 51)

F **(6)** The doctrine of lashes could not be of any assistance to the defendant since there was no evidence of acquiescence on the part of the plaintiff. At all material time, the plaintiff was in possession of the time deposit No. 0964 for RM2 million and there was no reason for the plaintiff to be worried about the safety of the said deposit which was securely kept G by the defendant's bank. Further, for purposes of withdrawal of the deposits, it was not shown that the plaintiff presented the receipt of the time deposit to the defendant's personnel for the endorsement to be made at the back of the time deposit receipt. There was a failure to prove that the letter of indemnity issued by the defendant was executed by the H plaintiff and there was no evidence to show that this letter was sent and received by the plaintiff. In the circumstances, the defendant had to account for the disappearance of the deposit of RM2 million together with the interest accrued in the defendant's bank. (paras 52 - 55)

Case(s) referred to:

I *Bonham-Carter v. Hyde Park Hotel Ltd [1948] 64 TLR 177* ***(refd)***

Chiew Lip Seng v. Perwira Habib Bank Malaysia Bhd [1999] 5 CLJ 112 HC ***(refd)***

Q2 Engineering Sdn Bhd v. PJI-LFGC (Vietnam) Ltd & Ors [2012] 8 CLJ 1005 HC ***(refd)***

Tan Sri Khoo Teck Puat & Anor v. Plenitude Holdings Sdn Bhd [1995] 1 CLJ 15 FC ***(refd)***

For the plaintiff - KC Wong; M/s KC Wong Assocs
For the defendant - Desmond Sahathevan; M/s Battenberg & Talma Advocs

Reported by Kumitha Abd Majid

JUDGMENT

Alwi Wahab JC:

Introduction

[1] The plaintiff is a company incorporated and registered under the Companies Act 1965 in Malaysia and having its business address at Level 1, Block G19, Taman Sri Sarawak Mall, Jalan Borneo, 93100 Kuching, Sarawak.

[2] The defendant (formerly known as The Hongkong And Shanghai Banking Corporation Limited) is a company incorporated and registered under the Companies Act 1965 in Malaysia and having its registered office at 15th Floor, North Tower, 2 Leboh Ampang, Kuala Lumpur Wilayah Persekutuan and a business address at No. 2, Leboh Ampang, Kuala Lumpur Wilayah Persekutuan and having a branch office at Bangunan Binamas, Lot 138, Section 54, KTLD, Jalan Padungan, 93100 Kuching, Sarawak.

[3] By a court order dated 4 October 1993, the business and operations of the Hong Kong and Shanghai Banking Corporation Limited were all transferred and vested in the defendant, including the plaintiff's Time Deposit Receipt No. 0964 dated the 28 October 1988 issued by the Hong Kong and Shanghai Banking Corporation Limited.

[4] The plaintiff now is claiming against the defendant to account for the time deposit of RM2 million placed with the defendant on 28 October 1988.

The Facts

[5] Pursuant to the said time deposit of RM2 million pledged by the plaintiff with defendant, a Time Deposit Receipt No. 0964 dated the 28 October 1988 under the plaintiff's Account No. 322-062878-145 was issued by the defendant.

[6] After more than 20 years, plaintiff *vide* letter dated 15 April 2010 made inquiry with the defendant on the deposit balance of the said Time Deposit Receipt No. 0964 as at March 2010 with the interest earned over the years during which period the said time deposit was placed with the defendant.

[7] In reply to the plaintiff's query, the defendant stated the sequence of events pertaining to the said Time Deposit Receipt No. 0964 in its letter dated 25 May 2010 as follows:

i. Time Deposit Receipt No. 0964 was uplifted on 28.2.89 and the proceeds of RM2,015,000.00 was placed under new Time Deposit Receipt No. 0972 for 3 months' maturing on 28.4.89;

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ii. Time Deposit Receipt No. 0972 was on 28.4.89 renewed for a further 3 months' period maturing on 28.7.89 with renewed principal of RM2,030,112.05;

iii. Time Deposit Receipt No. 0972 was on 28.7.89 renewed for a further 3 months' period maturing on 28.10.89 with renewed principal of RM2,047,875.98;

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iv. Time Deposit Receipt No. 0972 was on 3.10.89 uplifted but placed back on 4.10.89 under Time Deposit Receipt No.0980;

v. Time Deposit Receipt No. 0980 for RM2,047,875.98 was uplifted on 20.10.89.

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[8] Being dissatisfied with the defendant's explanation, the plaintiff lodged a police report on 12 August 2010 (BDD (C) pp. 2-3) and wrote a letter dated 15 August 2010 to the director, Bank Negara (BDD (C) p. 1) for the purpose of their investigation. In her police report, PW1 stated that she found the Time Deposit Receipt No. 0964 in February 2010 after going through some

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boxes in the store room. Upon her inquiry with the defendant's bank and after she had been informed that the said deposit was already withdrawn, she suspected that there was something amiss as she had never made any withdrawal.

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[9] On 18 October 2011 the plaintiff's advocates wrote a letter to the defendant requesting for the detail balance of the said Time Deposit of RM2 million placed with the defendant under the plaintiff's Account No. 322-062878-145. The defendant replied to the plaintiff *vide* the defendant's advocates' letter dated 11 November 2011 stating that the plaintiff had already uplifted the time deposit in 1989 and the account had

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been closed.

The Plaintiff's Case

[10] The plaintiff contended that they have not made any withdrawal of the sum of RM2 million deposited as the said Time Deposit Receipt No. 0964

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was and is still at all material time in the plaintiff's possession. The plaintiff had never presented the said Time Deposit Receipt No. 0964 to the defendant's bank for withdrawal of the said sum of RM2 million deposited.

[11] The director of the plaintiff, Aisah Zainab binti Mahmud (PW1) testified in court that there was never any instruction from the plaintiff to the

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defendant to uplift the said Time Deposit Receipt No. 0964. She disagreed with learned counsel for the defendant's suggestion that the said Time Deposit Receipt No. 0964 was uplifted by the plaintiff on 28 February 1989 and the proceeds of RM2,015,000 was placed in the new Time Deposit Receipt No. 0972 (p. 21 (line 1-9) of the notes of proceeding).

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[12] The plaintiff further contended that the proceeds of the Time Deposit Receipt No. 0964 could not be placed under the new Time Deposit Receipt No. 0972 for three months as alleged by the defendant as there was no

instruction from the plaintiff to the defendant for doing so. It was further contended that the Time Deposit Receipt No. 0964 could by itself be extended for another three months without a new time deposit be issued at all.

[13] The plaintiff argued that if the defendant's allegation is true, the plaintiff should have been informed of this placement of the proceeds from the Time Deposit Receipt No.0964 to new Time Deposit Receipt No. 0972 by the defendant. Further, the alleged new Time Deposit Receipt No. 0972 had never been given to the plaintiff nor was it produced during the trial to prove its existence.

[14] The plaintiff also contended that there was no truth in the defendant's allegation in its letter dated 25 May 2010 that the Time Deposit Receipt No. 0972 was issued on 28 February 1989 because the maturing date on 28 April 1989 of three months has not been completed. There was also no truth that the Time Deposit Receipt No. 0972 was renewed for further three months to 28 July 1989 with new principal amount of RM2,030,112.50 and it was further renewed on 28 July 1989 for further three months to 28 October 1989 with a renewal principal of RM2,041,875.98. Premised on the same argument, there was no instruction from the plaintiff and no such Time Deposit Receipt No. 0972 was ever produced in this court to show that such time deposit ever exists.

[15] The plaintiff further contended that the defendant's allegation that Time Deposit Receipt No. 0972 was uplifted on 3 October 1989 and placed back on 4 October 1989 under new Time Deposit Receipt No. 0980 could not be accepted as there was no reason why the plaintiff would want to do so before the maturity date of Time Deposit Receipt No. 0972 on the 28 October 1989 and for the same amount of proceeds to be placed under a new Time Deposit No. 0980. Besides, there had been no instruction from the plaintiff for the uplifting of the said Time Deposit Receipt No. 0972 and there was no instruction from the plaintiff to place the proceeds therein back into the new Time Deposit Receipt No. 0980 on 4 October 1989. The plaintiff contended that there was no letter from the defendant to the plaintiff of such alleged uplifting and placing back of the amount under new Time Deposit Receipt No. 0980. This Time Deposit Receipt No. 0980 was also not produced in court.

[16] The plaintiff submitted that the defendant's allegation that there was a letter of indemnity allegedly issued and signed by the plaintiff dated 3 October 1989 (exh. BDD (C) p. 5) cannot be true in the light of the sequence of events suggested by the defendant that occurred from the time the Time Deposit Receipt No. 0964 was issued until it was finally replaced by Time Deposit Receipt No. 0980 and which was uplifted on 20 October 1989.

[17] The plaintiff further submitted that it was illogical for the defendant to accept the plaintiff's alleged letter of indemnity dated 3 October 1989 due to the alleged mislaid, lost or destroy of the original Time Deposit Receipt No. 0964 because the new Time Deposit receipt No. 0972 to replace the Time Deposit Receipt No. 0964 was only issued about eight months then by 3 October 1989 and had not reached its maturing period.

[18] The plaintiff also contended that the defendant's allegation that the proceeds of the Time Deposit Receipt No. 0980 was transferred to the plaintiff's Current Account No. 322-062878-001 on 20 October 1989 cannot be true as there was no evidence that the alleged statement of account was served on the plaintiff. Furthermore, there was no evidence of any written instruction from the plaintiff to the defendant to transfer the alleged proceeds of the Time Deposit Receipt No. 0980 to the defendant's current account at all times.

[19] The plaintiff further argued that if the defendant's allegation is true that both Time Deposits Receipt No. 0972 and 0980 were uplifted by the plaintiff which the plaintiff denied even to its very existence, the defendant must produce and show that the plaintiff duly signed at the back of the said original time deposit receipts for each time that the said deposits were uplifted. This is because the defendant's witness ie, Saradaran Pillai a/l A Janandhanan Pillai (DW1) had testified that it was the defendant's bank standard practice to require the said time deposit receipts to be surrendered back to the defendant for uplifting and the plaintiff must sign at the back of the original Time Deposit Receipts No. 0972 and 0980 for that purpose (p. 74 (line 7-26) of the notes of proceeding).

The Defendant's Case

[20] The defendant contended that the Time Deposit Receipt No. 0972 was uplifted on the 3 October 1989 by virtue of the plaintiff's letter of indemnity dated 3 October 1989 duly signed and executed by the plaintiff's director. The defendant referred to the said letter of indemnity dated 3 October 1989 for its full terms and effect, in particular the handwritten notation at the bottom part of the letter which stated that "The above amount to be transferred to Jakara's a/c (current)".

[21] According to the defendant's sequence of events, the said plaintiff's Time Deposit No. 0972 was uplifted on 3 October 1989 together with interest thereon without the production of the original Time Deposit Receipt No. 0964 which was mislaid, lost or destroyed by the plaintiff. The proceeds of the said time deposit in the sum of RM2,047,875.98 inclusive of interest was transferred to the plaintiff's Current Account No. 322–062878–001 ("plaintiff's current account").

[22] The defendant submitted that the sum of RM2,047,875.98 was debited from the plaintiff's current account for placement in a fixed deposit and Time Deposit Receipt No. 0980 on 4 October 1989 which was given with a maturity date until 28 October 1989. This Time Deposit Receipt No. 0980 was backdated to commence from 28 July 1989. A

[23] The defendant further submitted that the said Time Deposit Receipt No. 0980 was uplifted on 20 October 1989 and the sum of RM2,047,875.98 inclusive of interest thereon was transferred to the plaintiff's current account to cover the overdraft position of RM1,949,261.48 therein. B

[24] The defendant claimed that the aforesaid sequence of transactions were reflected in the micro fiche copies of the monthly statement of the plaintiff's current account No. 322-062878-001 from October, 1988 to October, 1989 (exh. BDD (C), pp. 10–22). C

[25] The defendant further submitted that it sent a series of letter dated 25 May 2010 (BAD (B), pp. 9-10); 17 September 2010 (BDD (C), pp. 7-8) and 11 November 2011 (BDD (C), p. 9) respectively, informing the plaintiff that they had already uplifted their time deposit in 1989 and the plaintiff's account had been closed. As such, there is nothing for the defendant to account. D

[26] The defendant further contended that the plaintiff's action is wholly unmaintainable based on the doctrine of laches. There was a delay of more than 20 years (ie, the event occurred in 1989 and the complaint was brought to the plaintiff's attention in 2010) before the present action was taken by the plaintiff. By reason of the delay in commencing the present action, the defendant has been prejudiced beyond repair. The defendant's records were incomplete as banking records were only stored for seven years, after which they were destroyed. The defendant had difficulty in locating witnesses ie, the staff who had personal knowledge of this matter after a long passage of time. E F

Court's Findings G

Whether The Time Deposit Receipt No. 0964 Was Uplifted By The Plaintiff On 28 February 1989 And That The Proceeds Of RM2,015,000 Was Placed Under New Time Deposit Receipt No. 0972 For Three Months Maturing On 28 April 1989

[27] There was no evidence adduced before this court that there was any instruction by the plaintiff to the defendant to place the proceeds of the Time Deposit Receipt No. 0964 into a new Time Deposit Receipt No. 0972. PW1 said she did not give any instruction to the defendant pertaining to Time Deposit Receipt No. 0964 and she disagreed with the defendant's suggestion that the proceeds of the Time Deposit Receipt No. 0964 was uplifted and placed into a new Time Deposit Receipt No. 0972. In the light of this denial, the burden of proof is shifted to the defendant to prove that there was such H I

A a new Time Deposit Receipt No. 0972 issued by the defendant on the instruction of the plaintiff. As the defendant was not able to prove the aforesaid, my answer to this first issue is that the defendant's allegation that there is such a new Time Deposit Receipt No. 0972 must fail.

B **[28]** There was no explanation given by the defendant why the original Time Deposit Receipt No. 0964 issued on 28 October 1988 had to be uplifted and replaced with a new Time Deposit Receipt No. 0972 issued on 28 February 1989 when the original Time Deposit Receipt No. 0964 which was maturing on 28 January 1989 could be automatically extended for another three months without a new time deposit being issued at all. This is C based on the evidence of DW1 that it was the defendant's common practice that the time deposit would be automatically renewed every three months although there was a time which he could not remember that renewal instruction had to be given by the client (p. 83 (line 5-12) of the notes of proceeding). There was no evidence of any instruction by the plaintiff either D verbally or in writing.

[29] There was also no documents or letter between the plaintiff and the defendant to prove that the plaintiff was ever informed of the replacement for Time Deposit Receipt No. 0964 to Time Deposit Receipt No. 0972 and even if the plaintiff was informed of the defendant's action, it is still unlawful E for the defendant to uplift and replace the time deposit unilaterally without the instruction by the plaintiff.

Whether The Time Deposit No. 0972 Was Uplifted On 3 October 1989 Together With Interest Without The Production Of The Original Receipt Which Was Alleged To Have Been Mislaid, Lost Or Destroyed By Virtue Of A Letter Of F *Indemnity Dated 3 October 1989 Duly Executed By The Plaintiff*

[30] The defendant alleged the Time Deposit Receipt No. 0972 was uplifted on 3 October 1989 without the production of the original Time Deposit Receipt No. 0964 which was mislaid, lost or destroyed by the G plaintiff. The defendant also alleged that the letter of indemnity was signed and executed by the plaintiff on 3 October 1989 with the plaintiff's instruction (in handwritten notation) for the deposit amount to be transferred to the plaintiff's current account.

[31] In respect of the defendant's first allegation that the Time Deposit H Receipt No. 0972 was uplifted on 3 October 1989 without the production of the original Time Deposit Receipt No. 0964 as it was mislaid, lost or destroyed by the plaintiff, there was nothing in evidence to support this allegation that the plaintiff ever complaint to the defendant that they had mislaid, lost or destroyed the original Time Deposit Receipt No. 0964. The I said original Time Deposit Receipt No. 0964 was at all times with the plaintiff and it was never surrendered to the defendant for withdrawal.

[32] On the defendant's second allegation that the letter of indemnity dated 3 October 1989 was executed by the plaintiff on 3 October 1989 with the plaintiff's instruction (in handwritten notation) for the deposit amount to be transferred to the plaintiff's current account, the defendant failed to prove that it was the plaintiff's director who signed on that letter. PW1 had strongly denied that she was the person who signed on the said letter of indemnity dated 3 October 1989 when she was cross-examined by learned counsel for the defendant.

[33] PW1's evidence of her denial as the person who signed on the letter of indemnity is reproduced as follows:

Put : This is your signature on the left below the words "Jakara Sdn Bhd" at page 5 of Bundle C?

A : This is not my signature.

Q : Could any other director have executed this Letter of Indemnity on behalf of Jakara Sdn Bhd?

A : No.

Q : So you maintain that this is not your signature?

A : Yes.

(p. 26 (line 23-25) and p. 27 (line 1-6) of the notes of proceeding)

[34] In her evidence in court, PW1 had consistently denied her involvement as follows:

Put : That the signature below the words "Jakara Sdn Bhd" is your own signature at page 5 of Bundle C.

A : I disagree. It is not my signature.

Put : That you did in fact sign this letter of indemnity at that time on 3/10/1989 but are unable to recall after more than 20 years and as you claim to have been busy at that time.

A : I disagree.

Q : Look at bottom left hand corner of page 5 of Bundle C, it states 'that the above amount is to be transferred to Jakara's current account", do you agree?

A : I read and look at it and this is not my instruction and it is not my handwriting.

(p. 27 (line 18-25) and p. 28 (line 1-5) of the notes of proceeding)

[35] Since it was the defendant's case that the signature appeared in the defendant bank's letter of indemnity dated 3 October 1989 was executed by the plaintiff ie, PW1, the burden is therefore on the defendant to prove such allegation by calling the person who witnessed PW1's signature or who attended to the PW1's signature. It was also not proven who was the person

who wrote the notation at the bottom left hand corner of that letter of indemnity with the instruction that the deposits are to be transferred to the plaintiff's current account.

[36] The basic rule in civil cases is trite that one who alleges must prove. I quote what NH Chan JCA said in *Chiew Lip Seng v. Perwira Habib Bank Malaysia Bhd* [1999] 5 CLJ 112; [1999] 1 MLJ 310, and it is as follows:

> Here the Plaintiff denies that the charge was executed by him … It seems to me that that throws the onus on the Defendant who has to prove that the charge was executed by the Plaintiff.

[37] The defendant however produced the statement of account of the plaintiff's current account (BDD (C) pp. 10-22) in order to support its allegation on the transactions of the plaintiff's time deposit from October 1988 to October 1989. The counsel for the plaintiff, Mr KC Wong objected to the production and the marking of these documents as exhibits for the reason that there was no such disclosure by the defendant on the alleged plaintiff's current account in the micro fiches film in the defendant's affidavit verifying document which was only revealed and made known to the plaintiff during the trial.

Micro Fiche Records

[38] I allowed the marking of the copies of statement of account of the plaintiff's current account as defendant's exhibits (BDD (C) pp. 10-22) after I heard the evidence of defendant's witness ie, Muhammad Rafiq Rani bin Abdullah (DW2) who was the officer in charge of the defendant's micro fiche records.

[39] DW2 explained how the plaintiff's current account statement was produced from the micro fiche film. He testified that the photo images of customers' statement of account are stored in the micro fiche negatives. In order to view the contents of the micro fiche negatives, the micro fiche reader is used.

[40] DW2 testified that unlike the statement of account, time deposit history record could not be produced although it is available in the micro fiche negatives. This is because the contents of the records would include the account numbers and details of other customers' account and the defendant had the duty to withheld their information.

[41] In marking the copies of statement of account of the plaintiff's current account as exhibits, I told parties that the probative weight of these documents would be decided upon considering all the evidence before this court.

[42] In his submission, Mr Desmond counsel for the defendant, referred to the plaintiff's current account statement for October, 1988 until January, 1989 (BDD (C) pp. 10-13) where the sum of RM2 million is stated at the

bottom of each page from pp. 10-13. The record of transaction in the plaintiff's current account (BDD (c) pp. 10-13) was not consistent with the evidence adduced in court as it only concerns with a deposit of RM2 million pledged with the defendant under the plaintiff's Time Deposit Account No. 322-062878-145. The defendant did not adduce any evidence that the sum of RM2 million deposited under Time Deposit Receipt No. 0964 on 28 October 1988 and uplifted on 28 February 1989 were the transactions made under the plaintiff's Current Account No. 322-06287-001.

[43] There was no explanation why the sum of RM2 million could appear at the bottom of the plaintiff's current account No. 322-062878-001 when it was deposited in the plaintiff's time deposit account no. 322-062878-145. Mr Desmond did not ask DW2 to explain on the contents of exhs. BDD (C) pp. 10-22 but chose to submit the same in his written submission without subjecting it to cross-examination by the opposing party. The contents of BDD (C) pp. 10-22 have to be explained by the defendants' witnesses for the court to be fully appraised with the facts relevant to this case. The defendant cannot throw these statement of account to the court and have it marked as exhibit without explaining its contents relevant to the case through the evidence of the witness.

[44] The above fundamental principal has been often cited. The Federal Court in *Tan Sri Khoo Teck Puat & Anor v. Plenitude Holdings Sdn Bhd* [1995] 1 CLJ 15; [1994] 3 MLJ 777 quoted the words of Lord Goddard in *Bonham-Carter v. Hyde Park Hotel Ltd* [1948] 64 TLR 177 as follows:

> … It is not enough to write down the particulars, so to speak, throw them at the head of the Court, saying: "This is what I have lost, I ask you to give me these damages". They have to prove it.

[45] For this reason, I would not give any weightage to exh. BDD (C) pp. 10-22. Furthermore, the defendant could not prove that such alleged statement of account of the plaintiff's Current Account No. 322-062878-001 was sent and received by the plaintiff.

Whether The Proceeds Of The Time Deposit Receipt No. 0972 In The Sum Of RM2,047,875.98 Inclusive Of Interest Were Transferred To The Plaintiff's Current Account No. 322-062878-001 And That On 4 October 1989, The Sum Of RM2,047,875.98 Was Debited From The Plaintiff's Current Account For Placement In Time Deposit Receipt No. 0980 Which Was Given With A Maturity Date Of 28 October 1989

[46] I am not convinced with the statement of account as shown in BDD (C) p. 22 for the reason which I mentioned earlier ie, the details of the account was not clearly explained to the court and they were not supported with source document. The defendant is required to prove and explain the contents of these documents since they were only copies of the original documents which were already destroyed but alleged to be kept in the micro

fiche negatives. Evidence must be adduced to support the figures allegedly stated in the plaintiff's current account. Similar reasoning was adopted by Lee Swee Seng JC in *Q2 Engineering Sdn Bhd v. PJI-LFGC (Vietnam) Ltd & Ors* [2012] 8 CLJ 1005; [2013] 8 MLJ 157, where His Lordship held that the source document from which the project costing calculation sheet is derived is crucial and critical as without that the so-called base costs before the profit margin factor, is just a figure plucked from the air.

[47] In the present case, the defendant did not produce any evidence that the plaintiff ever instructed the defendant to transfer the deposit of RM2,047,875.98 into the plaintiff's Current Account No. 322-062878-001 when the Time Deposit Receipt No. 0972 was alleged to be uplifted on 3 October 1989. Both Time Deposits Receipt No.0972 and 0980 were not produced at all.

[48] Assuming that the Time Deposit No. 0964 was mislaid, lost and destroyed, and deposit therein was uplifted and given a new Time Deposit Receipt No. 0972 is true, then why there was the need to uplift the Time Deposit Receipt No. 0972 once again on 3 October 1989 which was at all times in the possession of the defendant as there was no evidence that it was passed on to the plaintiff. Hence, the Time Deposit Receipt No. 0972 cannot be lost or mislaid which requires the defendant to issue a letter of indemnity to be executed by the plaintiff for the withdrawal of the deposit to take place.

[49] Without any evidence adduced by the defendant, it is ridiculous for the deposit under Time Deposit Receipt No. 0972 which was alleged to be credited into the plaintiff's current account on 3 October 1989 had to be debited on 4 October 1989 to be placed in the fixed deposit and Time Deposit Receipt No. 0980 with a maturity date of 28 October 1989.

[50] Neither was there any reasonable explanation given why the Time Deposit 0972 was uplifted on 3 October 1989 when the maturity date was given until 28 October 1989. This is in addition to what I have said that the letter of indemnity dated 3 October 1989 allegedly signed by the plaintiff could not be true in the light of the inconsistent facts from the defendant's alleged sequence of events.

[51] In order to prove that certain amount of money more than RM2 million was credited, then debited before it was finally uplifted and transferred into the plaintiff's current account, Mr Desmond referred to p. 22 of BDD (C). In my view it is unfair to the plaintiff if this court were to accept p. 22 of BDD (C) on its face value without further evidence from the defendant. No statement of account on the time deposits history record was given to the plaintiff for reason of confidentiality but in all fairness the defendant should in my view furnish the details as regards to the manner how the deposits were uplifted, who withdrew it and the person from the defendant's bank who attended to the withdrawal.

Lashes

[52] The doctrine of lashes cannot be of any assistance to the defendant as there was no evidence of acquiescence on the part of the plaintiff. At all material time, the plaintiff was in possession of the Time Deposit No. 0964 for RM2 million and there was no reason for the plaintiff to be worried about the safety of the said deposit which was securely kept by the defendant's bank.

[53] Furthermore, the withdrawal of the deposits from the defendant's bank requires the plaintiff to present the receipt of the time deposit itself to the defendant's personnel for the endorsement to be made at the back of the time deposit receipt which did not happen in the present case.

[54] The letter of indemnity dated 3 October 1989 issued by the defendant was not proven to be executed by the plaintiff and there was no evidence to show that this letter was sent and received by the plaintiff.

[55] Since there was no instruction from the plaintiff verbally or in writing for any withdrawal of deposit kept by the defendant, the defendant must account for the disappearance of the deposit of RM2 million together with the interest accrued in the defendant's bank.

Conclusion

[56] On all these considerations, the plaintiff has proven its case on the balance of probabilities. The plaintiff's claim is therefore allowed with costs of RM20,000.